

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT LEE MERRITT AND WINNIE MERRITT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

G. WESLEY MERRITT AND FANNIE J. MERRITT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JACK D. MERRITT AND WILLA GRAY MERRITT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

VIRGIL BOWLING AND GLADYS BOWLING

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JAMES O. WATSON 3D AND LUCY J. WATSON

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**The Solicitor General, on behalf of the Commis-
sioner of Internal Revenue, petitions for a writ of**

(1)

certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled cases.

OPINIONS BELOW

The opinion of the Tax Court is reported at 39 T.C. 257. The opinion of the court of appeals is reported at 330 F. 2d 161.*

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1964. By order of the Chief Justice, the time for petitioning for a writ of certiorari was extended to and including July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents, who mined coal under oral contracts with a lessee of mineral rights from whom they received a specified price per ton, were entitled to percentage depletion allowances on the amounts received from the lessee.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 613. PERCENTAGE DEPLETION.

(a) *General Rule.*—In the case of the mines, wells, and other natural deposits listed in sub-

* The opinion is printed at pp. A1-A4 of the petition for certiorari in *Paragon Jewel Coal Company Inc. v. Commissioner*, No. 134, this Term, upon the granting of which this petition is conditioned. We have accordingly not reprinted the opinion in this petition.

section (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). * * * In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

STATEMENT

Paragon Jewel Coal Company holds mineral leases on coal-bearing lands in Virginia. It entered into oral contracts with respondents whereby respondents undertook to mine the coal and deliver it to Paragon's tippie in return for a per-ton price subject to change by Paragon. Paragon then sold the coal on the open market. In tax returns for years 1954 to 1957 both Paragon and respondents sought to take percentage depletion allowances under Section 613 of the Internal Revenue Code of 1954 on the amounts paid by Paragon to respondents. Petitioner disallowed the deductions to both Paragon and respondents. The Tax Court, in consolidated proceedings, held that the oral agreements between Paragon and respondents did not give respondents an "economic interest" in the coal in place so as to entitle them to depletion allowances under this Court's decision in *Parsons v.*

4.
Smith, 359 U.S. 215. It sustained Paragon's claim to depletion allowances on these amounts. The court of appeals reversed and directed the entry of judgment sustaining respondents' claims and rejecting those of Paragon. Paragon has filed a petition for certiorari seeking review in this Court of the court of appeals' rejection of its claim for depletion allowances on the amounts it paid to respondents. *Paragon Jewel Coal Company, Inc. v. Commissioner*, No. 134, this Term.

REASONS FOR GRANTING THE WRIT

The government is essentially a stakeholder in this dispute between Paragon and respondents over who, under their oral agreements, has the required "economic interest" in the coal-mining property in relation to the amounts paid to respondents, so as to be entitled to the percentage depletion allowance thereon granted by Section 613 of the Internal Revenue Code of 1954. It is clear that "two or more persons 'cannot be entitled to depletion on the same income.'" *Parsons v. Smith*, 359 U.S. 215, 220. Hence if Paragon's petition for a writ of certiorari were granted and the judgment of the court of appeals were reversed, the judgment would also have to be reversed insofar as it sustained respondents' claim to depletion allowances on the same income. The present petition is being filed in order to protect the government's interest should Paragon ultimately prevail.

Accordingly, this petition should be granted if the Court grants the petition in No. 134.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MELVA M. GRANNEY,
MICHAEL MULRONEY,
Attorneys.

JULY 1964.